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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 608

SUSIE RANDOLPH,
Petitioner,

v.

GEORGE STOKES, *Defendant,*

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, a Corporation,
Garnishee, *Respondent.*

PETITION FOR WRIT OF CERTIORARI

to the United States Court of Appeals for the Eighth Circuit.

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INDEX

Opinion Below	2
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement of the Case	4
Reasons for Granting the Writ	5
Appendix A—Opinion Below	A1
Appendix B—Judgment Below	A11

Authorities

CASES

American Automobile Ins. Co. v. *Freundt*, 103 F.2d 613	6
American Fire Ins. Co. v. *Finn*, 341 U.S. 6, 71 S.Ct. 534, 540, 95 L.Ed. 702	6, 9, 11, 12
Brucker v. *Georgia Casualty Co.*, 14 F.2d 688	7
First Nat. Bank v. *Turnbull*, 16 Wall. 190, 21 L.Ed. 296	6, 8
Hoagland v. *Rost*, 1954, 126 F.Supp. 232	6, 9
Norman v. *Pennsylvania Fire Ins. Co.*, 237 Mo. 576, 141 S.W. 618, 619	6
Rothschild v. *Knight*, 184 U.S. 334, 22 S.Ct. 391, 393, 46 L.Ed. 573	6
Sanders v. *Armour Fertilizer Works*, 292 U.S. 190, 54 S.Ct. 677, 683-4, 78 L.Ed. 1206	6
Stoll v. *Hawkeye Casualty Co.*, 185 F.2d 96	6
Toney v. *Maryland Casualty Co.*, 29 F.Supp. 785	11

FEDERAL STATUTES

Title 28, U.S. Code, § 1441 ..... 2, 3
Public Law 85-554, H. R. 11,102 12

MISSOURI STATUTES

Section 525.070, RSMo. 1949 ..... 2, 3, 8
Section 525.200, RSMo. 1949 ..... 2, 3, 8

TEXTBOOK

Dobie on Federal Procedure, pp. 402-403 11

MISCELLANEOUS

Annotation, 22 A.L.R.2d 904 7
Article 35, Minn.L.Rev. 675-677 10

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to the United States Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Susie Randolph, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this cause.

Opinion Below

The opinion of the Court of Appeals has not been reported. A copy is appended as Appendix A.

260 F 2d 461.

Jurisdiction

The judgment of the Court of Appeals was entered November 3, 1958. A petition for rehearing was denied on November 28, 1958. Jurisdiction to issue the writ rests on Title 28, United States Code Annotated, § 1254.

Question Presented

Whether a garnishment proceeding under the garnishment statutes of Missouri, instituted by the issuance of a writ of execution by a court of Missouri for the collection of a judgment duly rendered in such state court, is removable to a federal court. There is no diversity of citizenship between the parties to the principal suit. The state courts of Missouri uniformly hold that a garnishment proceeding under the statutes of Missouri is neither a separate nor independent claim, but "is an incident or an auxiliary of the judgment and a means of obtaining satisfaction of the same by reaching the defendant's credit or property." The defendant debtor's liability insurer, summoned as garnishee after judgment in the principal action, is a non-resident corporation.

Statutes Involved

The statutes involved are Title 28, U.S. Code, § 1441 (c) and the Missouri statutes pertaining to garnishment proceedings, of which §§ 525.070 and 525.200, RSMo. 1949, are illustrative.

The pertinent portion of 28 U.S.C., § 1441 is:

"(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

Section 525.070, RSMo. 1949 provides:

"Whenever any property, effects, money or debts, belonging or owing to the defendant, shall be confessed or found by the court or jury, to be in the hands of the garnishee, he may, at any time before final judgment, discharge himself, by paying or delivering the same, or so much thereof as the court shall order, to the sheriff, from all further liability on account of the property, money or debts so paid or delivered."

Section 525.200, RSMo. 1949 provides:

"If, upon such trial, it shall appear that property, effects or money of the defendant are found in the hands of the garnishee, the court or jury shall find what property or effects, and the value thereof, or what money are in his hands, and unless he discharge himself, as provided in section 525.070, by paying over or delivering the same to the sheriff, or unless he shall, within such time as the court shall direct, as provided in section 525.080, pay or deliver up such property, effects or money, or shall execute his bond for the payment or delivery thereof, then the court shall enter up judgment against the garnishee for the proper amount or value as found in money, and execution may issue forthwith to enforce such judgment."

Statement of the Case

This is a proceeding in garnishment instituted in the state court of Missouri for the purpose of collecting a judgment for $10,000 secured by plaintiff, Susie Randolph, against defendant, George Stokes, in the state court of Missouri. This proceeding was instituted by the issuance of an execution against the defendant by the clerk of the circuit court of the City of St. Louis, Missouri, and the issuance of a summons to garnishee based upon said execution. Upon being served with summons, garnishee Employers Mutual Liability Insurance Company filed a petition for removal in the district court, alleging that the issues involved in this proceeding are "separate and distinct from the issues in the suit wherein plaintiff recovered final judgment against defendant" (R. 3). Plaintiff duly filed a motion to remand, upon the ground that under the Missouri statutes creating the remedy of garnishment a garnishment proceeding is auxiliary to and dependent on the principal action, and is not a "separate and independent" claim or cause of action within the meaning of 28 U.S.C., § 1441 (c). Plaintiff's motion to remand was overruled by the district court (R. 5).

Plaintiff was a passenger in defendant's automobile when it was struck by a freight train at a grade crossing in East St. Louis, Illinois (R. 19). Garnishee was liability insurer of defendant in the operation of his automobile (R. 12). Plaintiff recovered judgment against defendant for $10,000 in the state court of Missouri, and sought to enforce collection of that judgment through this proceeding in the state court of Missouri (R. 1). Garnishee contended that it was not liable to plaintiff under the defendant's insurance policy, charging that defendant had failed to cooperate with garnishee in that defendant had failed

to come to court for the second trial of the case, as directed by garnishee (R. 8-9).

Defendant contended that under an express provision of the insurance policy he was entitled to be reimbursed for his travel expenses in attending court, that the insurance company had wrongfully repudiated its obligation under the insurance contract in that it had refused to reimburse him for the expenses which he had incurred in attending court at the first partial trial of the case, and had explicitly refused to reimburse him for such reasonable expenses as he would incur in attending court for the second trial of the case, and that he was therefore justified in refusing to attend court at the second trial, other than the one day when he was actually present in court for the second trial (R. 18, 47). Plaintiff's offered instruction for a directed verdict was refused by the trial court (R. 58), and the jury returned a verdict in favor of the garnishee (R. 63).

On appeal, plaintiff renewed her objection to the jurisdiction of the federal court. The Court of Appeals noted that, "It would appear that Missouri regards garnishment as a proceeding auxiliary to the main suit", but commented that, "the classification which the Missouri courts give garnishment proceedings is in no way binding upon us." Without apparent consideration of the Missouri statutes which provided the basis for the state courts' conclusion that a garnishment proceeding "is an incident or an auxiliary of the judgment", the Court of Appeals held that the federal court had jurisdiction, and affirmed the judgment of the court below.

Reasons for Granting the Writ

The Court of Appeals has ruled, in effect, that every garnishment proceeding in a state court is removable to

the federal court if the garnishee be a non-resident. Such ruling appears to conflict with the decisions of this court in First Nat. Bank v. Turnbull, 16 Wall. 190, 21 L.Ed. 296 and American Fire Ins. Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 540, 95 L.Ed. 702, and it is in conflict with the decision of the Court of Appeals for the 7th Circuit in American Automobile Ins. Co. v. Freundt, 103 F.2d 613.

The opinion reaffirms the prior opinion of the same court in Stoll v. Hawkeye Casualty Co., 185 F.2d 96, in which the court observed:

> "Whether a garnishment proceeding is a 'suit' or civil action which may be removed, is a question upon which the courts are in disagreement."

The Court of Appeals declined to consider the provisions of the Missouri statutes creating the remedy of garnishment, other than to note that:

> "It would appear that Missouri regards garnishment as a proceeding auxiliary to the main suit. See Hoagland v. Rost, D.C. W.D. Mo., 126 F.Supp. 232, and cases therein cited."

Proceedings by garnishment were unknown to common law; they are purely creations of statute. Rothschild v. Knight, 184 U.S. 334, 22 S.Ct. 391, 393, 46 L.Ed. 573; Norman v. Pennsylvania Fire Ins. Co., 237 Mo. 576, 141 S.W. 618, 619. Mr. Justice Cardozo commented, in the dissenting opinion in Sanders v. Armour Fertilizer Works, 292 U.S. 190, 54 S.Ct. 677, 683-4, 78 L.Ed. 1206, that: "Garnishment and attachment today are statutory remedies. They are what the state creating them says they shall be."

The Court of Appeals' observation that there is conflict and disagreement among the various federal courts concerning removability of garnishment proceedings under

the diversity provision is confirmed by the extensive annotation upon that subject in 22 A.L.R. 2d 904 *et seq.* The author of the annotation noted:

> "By far the majority of the cases determining the removability of garnishment, however, are based on the nature of garnishment under the particular state statute *as interpreted by the local decisions.*" 22 A.L.R. 2d 923.

Prior to the Stoll case, the district courts of Missouri had ruled that garnishments under Missouri statutes were not removable. In Brucker v. Georgia Casualty Co., 14 F.2d 688, the court ruled:

> "A garnishment proceeding, provided by the statutes of Missouri, as construed by the courts of the state, is not an independent suit, but is supplemental to the main action and provides one of the means of securing a satisfaction of the judgment. This is the interpretation that the courts of Missouri have placed upon the statute. In Chicago Herald Co. v. Bryan, 195 Mo. 590, 92 S.W. 906, 6 Ann. Cas. 751, it is said that 'garnishment under our laws is one of the modes pointed out by the statute by which the execution is executed and is not a new suit. *It is an incident or an auxiliary of the judgment* and a means of obtaining satisfaction of the same by reaching the defendant's credit or property. As the garnishee must make his answer in the court whence the execution issues, it alone has exclusive control over its process.' In State ex rel. Stevenson v. Hughes, 135 Mo.App. 131, 115 S.W. 1069, the court held that a change of venue was not allowable in a garnishment proceeding, and that the issue raised in such a proceeding must be heard in the court where the judgment was rendered. All of the Missouri cases seem to be to the same effect. The construction thus given the statutes is not to be ignored in this court."

The court then considered the effect of Section 1852, R.S.Mo. 1919, now Section 525.070, R.S.Mo. 1949, which prescribes a procedure whereby a garnishee may discharge itself from all further liability by making payment or delivery to the sheriff of the court wherein was rendered the judgment sought to be collected. The court queried:

> "How would the garnishee avail itself of the privilege granted it under this statute, should the jurisdiction of the case be found in this court?"

The court considered also the effect of Section 1865, R.S.Mo. 1919, now Section 525.200, R.S.Mo. 1949, and ruled:

> "From a reading of this section it will be observed that a final judgment cannot be rendered against a garnishee after trial, until the garnishee has been given an opportunity to discharge himself by delivering the property found to be in his hands to the sheriff. In the event of his failure so to do, the judgment would be entered.
>
> "How is this procedure to be observed in this court?
>
> "These considerations, as well as others, indicate the dependency of the garnishment proceeding upon the original action, and point to confusion and conflict if the cause is to be partly adjudicated in one court, and partly determined in another. Such a situation is not desirable, and, as we understand the matter, was not contemplated by the removal statute (section 28 of the Judicial Code [Comp. St., § 1010]."

The court then quoted from the opinion in First Nat. Bank v. Turnbull, 16 Wall. 190, 21 L.Ed. 296, in part as follows:

> "'The contest could not have arisen but for the judgment and execution, and the satisfaction of the former would at once have extinguished the contro-

versy between the parties. The proceeding was necessarily instituted in the court where the judgment was rendered and whence the execution issued. No other court, according to the statute, could have taken jurisdiction. It was provided to enable the court to determine whether its process had, as was claimed, been misapplied, and what right and justice required should be done touching the property in the hands of its officer. It was intended to enable the court, the plaintiff in the original action, and the claimant, to reach the final and proper result by a process at once speedy, informal, and inexpensive. That it was only auxiliary and incidental to the original suit is, we think, too clear to require discussion'."

After the rendition of the opinion in the Stoll case, and the subsequent decision of this court in American Fire Ins. Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 540, 95 L.Ed. 702, a garnishment proceeding in the state court of Missouri was held by the federal district court not to be removable. In Hoagland v. Rost, 1954, 126 F.Supp. 232, the court declared:

"Subsequent to the decision in the Stoll case, the Supreme Court considered the effect of Section 1441 (c) on federal removal practice, in the case of American Fire Insurance Co. v. Finn, 341 U.S. 6, 71 S.Ct. 534, 540, 95 L.Ed. 702. Its opinion therein has necessitated a complete reappraisal of removal practice. That opinion noting the Congressional intent to further restrict removal by abrogating the 'separable controversy' test, demands that the emphasis be placed upon the words 'separate' and 'independent' which precludes any separation of claims arising from an 'interlocked series of transaction.'. * * *

"Can a claim made under Missouri garnishment procedure be so described?

"Garnishment is, of course, a wholly statutory remedy: the only remedy that a garnishor has is that

given him by the statute of the jurisdiction in which it is asserted. There can be no doubt that the courts of Missouri have uniformly held that the remedy provided by their statute is wholly auxiliary to and dependent on the main action. State ex rel. Auchincloss, Parker & Redpath, Inc., v. Harris, 349 Mo. 190, 159 S.W.2d 799, 805; Milliken vs Armour & Co., 231 Mo. App. 662, 104 S.W.2d 1027. *It cannot be independently maintained.* Smith v. Bankers Life Ins. Co., Mo.App., 170 S.W.2d 111, 114. Being so dependent, it cannot be said to be either 'separate' or 'independent' so as to sustain removability under Section 1441 (c), supra. Hence though such claim may be a 'civil action' as considered in the Stoll case, nevertheless, Missouri procedure making them auxiliary and dependent on a non-removed action, the former are not removable under Section 1441 (c), supra."

The Stoll decision was reviewed in an article in 35 Minn.L.Rev. 675-677, with the following analysis:

"In a determination of what constitutes a 'suit' or now a 'civil action' for purposes of removal it has been uniformly held that this litigation must be independent and separate, not an auxiliary or ancillary proceeding. Although federal judicial power may not be abridged or limited by a state in any manner, state law may affect the scope of federal jurisdiction. In the case of garnishment, which exists solely by virtue of statute, reference has been made to state statutes and statutory interpretation to determine if the proceedings are ancillary or independent for the purpose of the removal statute. Under this interpretation of the removal statute the divergent results of previous decisions can be reconciled on the basis of the character attributed to garnishment proceedings by the various jurisdictions.

"The instant case rejected this well founded limitation on removal because of the Supreme Court holding that garnishment is a suit within a provision allow-

> ing a governmental corporation to 'sue and be sued.' The reliance on that case as a final determination that garnishment is a 'suit' within the purview of the removal statute is hardly convincing. To say that the question is for the consideration of the federal courts uncontrolled by state law and thus ignore the nature of the state proceedings is to seize upon a generalization at the expense of a sound distinction *and to nullify the requirement of independent or separate litigation.*
>
> * * *
>
> "Nevertheless, basing removal on the character attributed to garnishment by the state would seem to present the better criterion. This interpretation would be in harmony with the usual strict construction of the removal statute restricting removal jurisdiction of the federal courts, and would be in accordance with the general practice of remanding the case to the state court where the jurisdiction of the federal court is doubtful."

Under the applicable statutes of Missouri pertaining to garnishment proceedings, the effect of the Court of Appeals' decision is, as stated in Dobie on Federal Procedure, pp. 402-403, and in Toney v. Maryland Casualty Co., 29 F.Supp. 785, to split the garnishment proceeding

> "into two parts, with the principal part in the state court and an appendage in the federal court, a situation which would be as unfortunate from a juristic, as it would be undesirable from a practical standpoint."

This court ought to act to put an end to the confusion and conflict which now exists in the federal courts with reference to removability of garnishment proceedings under the diversity provision.

In the Finn case, supra, this court noted, with reference to the 1948 revision of § 1441 (c), that:

"Another and important purpose was to limit removal from state courts." 341 U.S. l.c. 9-10.

And also:

"The Congress, in the revision, carried out its purpose to abridge the right of removal." 341 U.S. l.c. 10.

The foregoing conclusion of this court was fortified by the subsequent action of Congress, on July 25, 1958, in enacting Public Law 85-554; H. R. 11,102, further restricting removal in diversity cases.

Federal courts ought not, by judicial construction, expand right of removal in diversity cases, in direct contravention of the indisputable purpose of Congress to abridge the right of removal in such cases.

Respectfully submitted,

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[Emphasis throughout this petition ours.]

APPENDIX A.

Opinion Below.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16,009

Susie Randolph,
Appellant,
v.
Employers Mutual Liability Insurance Company of Wisconsin, Garnishee,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

(November 3, 1958.)

Sherman Landau for Appellant.

G. W. Marsalek (D. G. Dempsey and Moser, Marsalek, Carpenter, Cleary, Jaeckel & Hamilton were with him on the brief) for Appellee.

Before JOHNSEN, VAN OOSTERHOUT, and MATTHES, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

Plaintiff, Susie Randolph, appeals from judgment denying her the right to recover from the garnishee, Employers Mutual Liability Insurance Company of Wisconsin, Stokes' alleged insurer, the amount of a judgment obtained by

plaintiff against Stokes in the Circuit Court of the C[illegible] of St. Louis, Missouri.

Plaintiff was a passenger in Stokes' automobile when it collided with a train. She obtained the state court judgment for $10,000 against Stokes for damages alleged to have been caused her as a result of Stokes' negligent operation of his automobile. Said judgment has become final. Plaintiff caused execution to issue upon said judgment and, pursuant thereto, Employers Mutual Liability Insurance Company of Wisconsin was summoned as garnishee. The garnishee, after being served with summons, filed timely petition for removal of the action to the United States District Court for the Eastern District of Missouri, pursuant to the provisions of 28 U.S.C.A. § 1441 et seq., alleging that garnishment is a civil action, that the issues are completely different, separate and distinct from the issues in the state suit, that diversity of citizenship exists, and over $3,000 is in controversy. Plaintiff moved to remand the proceedings to the state court, on the ground that garnishment is auxiliary to the principal action, and that the garnishment proceeding is not a separate and independent cause of action. The motion to remand was overruled. Thereupon, the garnishee filed answer to interrogatories, in which it states that it originally questioned whether its policy of automobile liability insurance issued to Stokes was in full force at the time of the accident, but that it had waived such defense. Garnishee specifically denied any liability on its policy, because of Stokes' failure to cooperate in the defense of plaintiff's suit against Stokes. In response to further interrogatories requiring it to state the facts upon which it based its contention that Stokes had failed to cooperate, the garnishee stated that Stokes, although notified and requested to do so, had failed to appear in court at the time his case was to be tried.

Plaintiff's position is that Stokes' failure to appear at the state court trial was justified because the garnishee insurance company had, prior to the scheduled trial, breached its insurance contract by refusing to reimburse Stokes for expenses incurred in one day's attendance in court in connection with a previous attempt to try this case, which resulted in a mistrial, and had refused to guarantee Stokes' expenses at the time he was requested to attend. The issues were submitted to a jury, verdict was returned for the garnishee, and judgment was entered thereon. This appeal by the plaintiff followed.

Plaintiff asserts that she is entitled to a reversal for the following reasons: (1) the federal court lacks jurisdiction to try the Missouri garnishment proceeding; (2) the court erred in overruling plaintiff's motion for a directed verdict made at the close of all the evidence; and (3) the court erred in admitting certain evidence offered by the garnishee. We shall consider plaintiff's contentions in the order stated.

On the jurisdictional issue, it is plaintiff's contention that under Missouri law garnishment is not an independent suit, but is auxiliary to the main action, and hence that such a proceeding is not a removable civil action under 28 U.S.C.A. § 1441(a). Plaintiff further contends that the removal is prohibited by 28 U.S.C.A. § 1441(c). This court has passed upon the jurisdictional problem here presented in *Stoll* v. *Hawkeye Casualty Co.*, 185 F.2d 96, 22 A.L.R.2d 899, and has ruled adversely to plaintiff's contentions. In the *Stoll* case this court fully considered the authorities bearing upon the question of whether a garnishment proceeding after final judgment is a civil action. Many of the conflicting authorities are cited in footnote 1 at page 98. Other authorities are collected in Annotation, 22 A.L.R.2d

904. The court held that a post judgment garnishment proceeding is a civil action within the meaning of 28 U.S.C.A. § 1441(a), and that diversity of citizenship and the jurisdictional amount having been established, the garnishment proceeding was properly transferred to the federal court.

Plaintiff urges that the *Stoll* case is not controlling since there a South Dakota garnishment was involved while we deal with a Missouri garnishment. It would appear that Missouri regards garnishment as a proceeding auxiliary to the main suit. See *Hoagland* v. *Rost*, D.C. W.D. Mo., 126 F.Supp. 232, and cases therein cited. In the *Stoll* case, supra, we found it unnecessary to determine whether South Dakota regarded the garnishment proceeding as auxiliary and ancillary or as an independent suit. We stated (p. 99):

> "The question whether a civil action is removable and has been properly removed is one for the consideration of the federal court and is not controlled by State law." *Harrison* v. *St. Louis & San Francisco R. Co.*, 232 U.S. 318, 328-329, 34 S.Ct. 333, 58 L.Ed. 621; *Donald* v. *Philadelphia & Reading Coal & Iron Co.*, 241 U.S. 329, 333, 36 S.Ct. 563, 60 L.Ed. 1027; *Terral* v. *Burke Construction Co.*, 257 U.S. 529, 532, 42 S.Ct. 188, 66 L.Ed. 352; *Commissioners of Road Improvement District* v. *St. Louis Southwestern Ry. Co.*, 257 U.S. 547, 557-558, 42 S.Ct. 250, 66 L.Ed. 364."

> "We therefore find it unnecessary to consider whether the Supreme Court of South Dakota regards a garnishment proceeding as auxiliary and ancillary to the main action or as an independent suit, a question as to which the parties disagree. * * *

Since federal law controls on the question of whether the garnishment proceeding is a civil action, the classification which the Missouri courts give garnishment proceedings is in no way binding upon us.

Federal district courts have followed the Eighth Circuit and have upheld removal of Missouri garnishment proceedings to the federal court. *Clarkin v. Worthley*, D.C. W.D. Mo., 114 F.Supp. 877; *E. C. Robinson Lumber Co. v. Fort*, D.C. E.D. Mo., 112 F.Supp. 242. A contrary result was reached in *Hoagland* v. *Rost*, supra. In that case the court was of the opinion that *American Fire Insurance Co.* v. *Finn*, 341 U.S. 6, made the state law on classification of garnishment proceedings controlling. Plaintiff takes the same position here. We find nothing in the *Finn* case which impairs the basis of our decision in the *Stoll* case. In the *Finn* case a Texas resident brought suit against a Texas resident and two nonresident insurance companies. One of the insurance companies secured the removal of the case to the federal court. The three defendants were charged jointly and severally with liability for damages caused plaintiff by a fire loss. Since the action was joined against three defendants and was not removable as to one of the defendant, the removal proceedings were based upon section 1441(c) which provides:

> "(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

The Court in the *Finn* case held that there was a single wrong to the plaintiff—failure to pay the loss, that liability for such loss was asserted against all defendants, and hence the claims against the defendants were not separate and independent claims.

We are unable to see where section 1441(c) applies to the facts of our present case. Here we have no joinder

of causes of action. The only issue is the liability of the garnishee on its insurance contract. If the garnishee is liable, the amount of such liability has been established by the judgment against Stokes in the state court action. Moreover, in the present controversy we have only one defendant, the garnishee. There has been no joinder of the present civil action with any other cause of action and certainly no joinder with a cause of action which is not removable. It does not appear that Stokes, the defendant in the state court case, is a party to this proceeding. Even if he were to be considered a party to the present proceeding, he should be aligned for jurisdictional purposes with the plaintiff, as it would be to Stokes' interest to have the judgment against him satisfied by his insurer. *Removal Cases*, 100 U.S. 457, 468; *Baker* v. *Duwamish Mill Co.*, 149 Fed. 612; 3 Moore's Federal Practice, para. 19.03.

We believe that the present case, like the *Stoll* case, was properly removed to federal court by virtue of 28 U.S.C.A. § 1441(a). The garnishment proceeding is a civil action. Diversity of citizenship and the jurisdictional amount are established. Consequently, the district court acquired jurisdiction.

Plaintiff next contends that the court erred in overruling her motion for a directed verdict made at the close of all of the evidence. Such motion was based solely upon the ground that "no evidence has been offered or received which raises a jury issue on the allegations of defendant's alleged failure to cooperate with the garnishee, as alleged in garnishee's answer." There is abundant evidence in the record to support a finding that Stokes failed to cooperate by not responding to the garnishee's request that he appear at the scheduled trial. Plaintiff, in her

brief filed in this court, contends that the verdict should have been directed for her because the evidence conclusively shows that the garnishee breached its contract to reimburse Stokes for reasonable expenses incurred in attending trial. There is merit to the garnishee's contention that the issue now urged was not properly raised in plaintiff's motion for a directed verdict. Rule 50(a) of the Federal Rules of Civil Procedure requires that specific grounds be stated in the motion. The purpose of such requirement is to apprise the court of the movant's position. This court has held that the failure of a motion to state the specific ground relied upon is sufficient basis for denying the motion. *Railway Express Agency, Inc.*, v. *Epperson*, 8 Cir., 240 F.2d 189, 193; *Jones Truck Lines, Inc.*, v. *Argo*, 8 Cir., 237 F.2d 649, 652. It is obvious that the grounds of the motion that the evidence fails to establish that the insured failed to cooperate is not broad enough to cover the present contention that the insured was excused from cooperation by reason of insurer's prior breach of contract to reimburse for expenses.

In any event, plaintiff was not entitled to a directed verdict. The insurance contract undertook to reimburse the insured for reasonable expenses incurred, other than loss of earnings, at the insurer's request. The trial was in St. Louis. The insured lived in East St. Louis, but worked at least part-time in St. Louis. At a previous hearing, which resulted in a mistrial, insured had spent a day attending court, and claims that he incurred expenses for bridge toll, parking fees, and lunch, in an undisclosed amount. Similar expenses would likely be incurred at the pending trial. Under the conflicting evidence disclosed by the record, the jury could find that Stokes had not advised the garnishee as to the amount of expenses incurred, and

that he had not limited his demands to reimbursable expenses, but had sought primarily compensation for loss of earnings while attending court. Under its insurance policy the garnishee assumed no liability to reimburse its insured for loss of earnings occasioned by attending trial. A jury issue was presented as to garnishee's breach of its contract to reimburse for expenses. The court committed no error in overruling plaintiff's motion for a directed verdict.

Finally, we reach for consideration plaintiff's contention that the court erred in admitting certain evidence offered by the garnishee. Over the plaintiff's objection that they constituted self-serving declarations, the court admitted in evidence a telegram and various letters from the garnishee's representative to Stokes, wherein he advised Stokes that if he did not appear at the trial the insurer would not be responsible for the conduct of the trial or any costs incurred or judgment obtained. A letter written after Stokes failed to appear stated that the insurance company had withdrawn from the case, and that the company would not be responsible for the defense or any costs or judgment incurred. The earlier letter and telegram were material on the issue of whether Stokes had proper notice of the trial and to establish the request for his presence at the trial had been made. We are satisfied that the court committed no prejudicial error in receiving the exhibits. An important issue in the case was whether Stokes failed to cooperate by not reporting for trial. It was necessary for the garnishee to establish that proper demand had been made for Stokes' appearance at the trial. Plaintiff requested no instruction limiting the purpose of the admissibility of the exhibits. Plaintiff has not argued, and certainly has not demonstrated, that the parts of the exhibits objected to do not state the legal consequence

that would follow a failure to respond to a reasonable request to report at the trial, absent a legal excuse for failure so to do. The court in its instructions, in substance, properly advised the jury that, if Stokes failed to 'cooperate by failing to respond to a reasonable request to report for the trial, the garnishee would be relieved of liability under its policy, unless the jury find that the garnishee has previously breached the policy by refusing a reasonable request by Stokes for reimbursement of expenses.

Plaintiff also objected to evidence offered by the garnishee with reference to various phases of the trial in which plaintiff obtained judgment against Stokes in the state court, upon the sole ground that it was "an attempt to attack the judgment entered in the circuit court, and it being improper for that purpose." The garnishee stated that the evidence was introduced to show a pattern of collusion. The garnishee conceded that, if the plaintiff is entitled to recover in this action, she can recover the full amount of the judgment entered in her favor against Stokes in the state court. Evidence tending to show collusion is proper evidence on the issue of failure to cooperate. *Quisenberry* v. *Kartsonis*, . . . Mo. . . ., 297 S.W.2d 450; *Redler* v. *Travelers' Ins. Co.*, 342 Mo. 677, 117 S.W.2d 241. The evidence objected to tends to show some very unusual conduct on the part of the litigants. Evidence offered was to the effect that Stokes conferred freely with plaintiff's attorney at his office, but did not go to the office of the attorney garnishee employed to defend him. Stokes was served with notice of the action on the street in St. Louis by an officer who did not know him while Stokes was in the presence of the plaintiff's attorney. After the garnishee withdrew from Stokes' defense, Stokes appeared at

the trial, but did not testify, nor did he use the expert medical testimony of the doctor who had examined the plaintiff at the garnishee's request. Stokes' attorney apparently conceded that judgment for $9,500 would be proper. After the state court heard the evidence, judgment was entered for $5,000. The state court judge, as a witness in the present case, stated, "On the medical evidence, taking into consideration the defendant's [Stokes] station in life, and the injuries this woman received, I thought I was exceedingly fair with her." After the state court refused to vacate the judgment, plaintiff appealed and, upon stipulation, the St. Louis Court of Appeals reversed the trial court judgment, and ordered the entry of judgment for the plaintiff in the amount of $10,000. As heretofore stated, the validity of the judgment is not challenged. The federal court did not abuse its discretion in admitting the foregoing evidence bearing on the lack of cooperation issue. It would also appear that such evidence might also be relevant on the issue of whether Stokes was in good faith asserting that his failure to attend the trial was due to the alleged breach in garnishee's contract to reimburse him for expenses.

Our examination of the record satisfies us that the jury was fairly instructed, and that the case was fairly tried. The jury's verdict for the garnishee is supported by substantial evidence. The plaintiff has failed to establish that the court committed any reversible error.

Affirmed.

APPENDIX B

Judgment Below

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 16009 - - - - - - - - - - - - - September Term, 1958.

Monday, November 3, 1958.

Susie Randolph, Appellant,

v.

Employers Mutual Liability Insurance Company of Wisconsin, Garnishee.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

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Office-Supreme Court, U.S.
FILED
JAN 28 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 608.

SUSIE RANDOLPH,
Petitioner,

v.

GEORGE STOKES, Defendant,
EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, a Corporation,
Garnishee, Respondent.

SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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INDEX.

Page

Table of Cases, Rules, Statutes and Texts i

Brief:

I. Federal law determines the right to remove from state to Federal court 1

II. a. Under Missouri procedure, garnishment in aid of execution is an original and independent action 4

b. Under Federal removal statutes, garnishment in aid of execution is an independent claim and action 8

III. a. The instant opinion is not in conflict with opinions of the Supreme Court of the United States 10

b. The instant opinion is not in conflict with any opinion of any other United States Court of Appeals 15

IV. Conclusion 17

Table of Cases, Rules, Statutes and Texts Cited.

American Automobile Insurance Company v. Freundt (7th Cir.), 103 Fed. (2) 613 15

American Fire Insurance Company v. Finn, 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702 ..... 8, 10

Bondurant v. Watson, 103 U. S. 281, 26 L. Ed. 447, 450. 13

Bouvier's Law Dictionary—"Action" 8

Bradford v. Southern Railway Company, 195 U. S. 243, 248, 25 S. Ct. 55, 49 L. Ed. 178, 180 8

Brucker v. Georgia Casualty Company (E. D. Mo.), 14 F. (2) 688 ..... 6, 7

Calumet Paper & Paper Company v. Haskell Show Printing Company, 144 Mo. 331, 339, 340, 45 S. W. 1115 13,14
Chicago, R. I. & P. Ry. Company v. Stude, 346 U. S. 574, 580, 74 S. Ct. 290, 98 L. Ed. 317, 326 .....
Commissioners of Road Improvement District v. St. Louis Southwestern Ry. Co., 257 U. S. 547, 557, 558, 42 S. Ct. 250, 66 L. Ed. 364 .....
Courtney v. Pradt, 196 U. S. 89, 25 S. Ct. 208, 49 L. Ed. 398 .....

Federal Rules of Civil Procedure, Rule 64 3,7,8
First National Bank v. Turnbull, 16 Wall. 190, 21 L. Ed. 296 ..... 10, 11, 12, 13, 14
Freeman v. Howe, 24 How. 450, 16 L. Ed. 749, 752 .....

Garre v. American Mutual Casualty Company, 20 S. W. 2d 540 (Mo. App.) .....
Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 S. Ct. 807, 47 L. Ed. 1122 .....
Gwin v. Breedlove, 2 How. 29, 11 L. Ed. 167 .....

Harriman v. Northern Securities Company, 197 U. S. 244, 291, 25 S. Ct. 493, 49 L. Ed. 739, 761 .....
Harrison v. St. Louis & San Francisco Ry. Co., 232 U. S. 318, 328, 329, 34 S. Ct. 333, 58 L. Ed. 621 .....

Krippendorf v. Hyde, 110 U. S. 276, 282, 4 S. Ct. 27, 28 L. Ed. 145, 148 .....

Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387, 393, 43 S. Ct. 422, 67 L. Ed. 712, 714 .....

Mason City & Fort Dodge Ry. Co. v. Boynton, 204 U. S. 570, 27 S. Ct. 321, 51 L. Ed. 629, 633 .....
McGarry v. Lewis Coal Co., 93 Mo. 237, 6 S. W. 81, 3 Am. St. Rep. 522 13,14
Missouri Revised Statutes 1949, Sections 525.020, 525.070, 525.110, 525.170, 525.190 4,5

Rainwater v. Wallace, 351 Mo. 1044, 174 S. W. 2d 835 .....

Rice v. Sioux City Cemetery, 349 U. S. 70, 79, 75 S. Ct. 614, 99 L. Ed. 897, 904 15

Sanders v. Armour Fertilizer Works, 292 U. S. 190, 54 S. Ct. 677, 683, 684, 78 L. Ed. 1206, 1214 14

Shamrock Oil & Gas Corporation v. Sheets, 313 U. S. 100, 104, 61 S. Ct. 868, 870, 85 L. Ed. 1214 1

State ex rel. Rabiste v. Southern, Judge, etc., 300 Mo. 417, 431, 254 S. W. 166, 169, 170 14

Stoll v. Hawkeye Casualty Company (8th Cir.), 185 F. 2d 96 17

Tolchey v. New York Life Insurance Company, 314 U. S. 118, 134, 135, 62 S. Ct. 139, 86 L. Ed. 100, 105 ..... 12, 13

United States v. County Court of Clark County, 96 U. S. 211, 217, 218, 24 L. Ed. 628, 630 16

United States Code Annotated, Title 28, Section 1441 ..... 3, 8, 9, 10

Wilson v. St. Louis-San Francisco Ry. Co., 108 Mo. 588, 18 S. W. 286 5

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 608.

SUSIE RANDOLPH,
Petitioner,
SUSIE RANDOLPH,
Petitioner,

v.

GEORGE STOKES, Defendant,
EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY OF WISCONSIN, a Corporation,
Garnishee, Respondent.

SUGGESTIONS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

I.

Petitioner's complaint against the decision of the United States Court of Appeals is based upon the erroneous assumption that the removability of a garnishment proceeding is controlled by the characterization of a garnishment under Missouri law. This argument has been raised in this Court on a prior occasion and ruled adversely. In Shamrock Oil & Gas Corp. v. Sheets, 313 U. S. 100, 104, 61 S.

Ct. 868, 870, 85 L. Ed. 1214, Mr. Justice Stone, speaking for a unanimous Court, said:

> "* * * But at the outset it is to be noted that decision turns on the meaning of the removal statute and not upon the characterization of the suit or the parties to it by state statutes or decisions. Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 51 L. Ed. 629, 27 S. Ct. 321. The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in which instances suits are to be removed from the state to the federal courts: Cf. Burnet v. Harmel, 287 U. S. 103, 110, 77 L. Ed. 199, 204, 53 S. Ct. 74."

The opinion quoted *supra* is supported by a long line of decisions of this Court, including Harrison v. St. Louis & San Francisco R. Co., 232 U. S. 318, 328-329, 34 S. Ct. 333, 58 L. Ed. 621; Commissioners of Road Improvement Dist. v. St. Louis Southwestern Ry. Co., 257 U. S. 547, 557-558, 42 S. Ct. 250, 66 L. Ed. 364, and Mason City & Ft. D. R. Co. v. Boynton, 204 U. S. 570, 27 S. Ct. 321, 51 L. Ed. 629, 633. And exactly the same holding is found in the more recent case of Chicago, R. I. & P. R. Co. v. Stude, 346 U. S. 574, 580, 74 S. Ct. 290, 98 L. Ed. 317, 326.

The rationale of the Shamrock case, supra, and the succeeding and supporting decisions is obvious. It is axiomatic that the Constitution and statutes of the United States should be finally applied and interpreted by the courts of the United States without a veto or overriding power in the legislative or judicial branches of the various states' governments. If the argument forwarded by petitioner were adopted, the states could limit at will the right of removal by exercising a legislative or judicial fiat. The

effect would be to allow the states to accomplish indirectly what they cannot do directly, Courtney v. Pradt, 196 U. S. 89, 25 S. Ct. 208, 49 L. Ed. 398. The garnishment proceeding involved in the instant case is an adversary proceeding between a judgment creditor on one side and an insurance company on the other, concerning coverage afforded the judgment debtor, who is not in fact a party to the garnishment proceeding. Since there is diversity of citizenship between the judgment creditor and the insurer, respondent is afforded the right to remove the proceeding in accordance with the provisions of 28 U. S. C. A. 1441.

If twenty-four states should technically denominate such similar proceedings as "ancillary" to the suit in which judgment was obtained, and twenty-five states should define it as an "independent action" shall the garnishees in twenty-four states be deprived of, and the remainder be invested with, the right to remove the garnishment? The issues in each such instance are the same; the nature of the proceeding does not differ essentially; the reasons requiring removal are as valid in each instance; the same basis exists for the constitutional and legislative policy permitting removal. We respectfully submit that it is not, and never has been, the intent of Congress to apply the removal provisions of the statutes in a crazy-quilt fashion determined solely by technical terminology in the opinions of the various state courts. This is not to deny the right of the state courts and legislatures to employ whatever language they desire in describing the relation between an action in which a judgment is obtained and a garnishment against a third party, a stranger to the record, to obtain satisfaction of that judgment. Whether the judicial choice of words in a given state be "ancillary" or "independent," "auxiliary" or "original," the descriptive words cannot change the essential nature of the proceeding.

The holding, logic and effect of the Shamrock opinion, cited and quoted supra, are embodied in Rule 64, Federal

Rules of Civil Procedure,[1] which in effect embodies in Federal civil procedure the code of the state in which the Court is sitting, with respect to garnishment, attachment, lis pendens, and other similar remedies, regardless of whether the particular action originates in the District Court or is removed from the state court, and regardless also of "whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

Authority soundly based on reason and logic establishes the principle that interpretation of the removal statutes is by the United States courts, not governed by state law. The District Court must examine the substance of the garnishment procedure under state law, and then apply the law enacted by Congress.

II.

a. What then is the substance of garnishment procedure in Missouri, and in the instant case in particular? The garnishee is brought into court by service of process (Sections 525.020 and 521.170, Mo. Rev. Stats., 1949). The issues to be tried are determined wholly from pleadings filed respectively by the creditor and garnishee (Section

[1] At the commencement of and during the course of an action all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

525.190. Mo. Rev. Stats., 1949). No pleadings are required of or permitted by the judgment debtor, who is not a participant in the proceeding. Right to trial by jury is preserved, and either party may appeal from an adverse judgment (Section 525.190, Mo. Rev. Stats., 1949; Garre v. American Mut. Cas. Co., 20 S. W. 2d 540 [Mo. App.], Rainwater v. Wallace, 351 Mo. 1044, 174 S. W. 2d 835). If judgment is rendered against garnishee, it is an in personam judgment which may be enforced by general execution against his assets (Section 525.110, Mo. Rev. Stats., 1949). Procedurally, practically and effectively, the instant action is nothing more than a suit by plaintiff, as an alleged third-party beneficiary, on an insurance policy issued by garnishee to the judgment debtor. The proceeding in no manner differs from a direct action on the policy (for example, under a "medical benefit" provision). It is in no wise different than a trial on a policy of life insurance, health and accident insurance, etc., except for the appellation "garnishment" and the designation of the pleadings as "answer" and "denial", rather than "petition" and "answer." These superficial variations cannot cloak or hide the essential nature of the proceeding.

The Missouri decisions, even if they were determinative, do not indicate that garnishments are considered "ancillary" uniformly and for all purposes. Language indicates that for some purposes the Missouri appellate courts consider garnishments as independent actions. In Wilson v. St. Louis-San Francisco Ry. Co., 108 Mo. 588, 18 S. W. 986, the facts were that Mr. Wilson had obtained judgment against another railroad in a prior suit, and an execution was returned nulla bona as to corporate property of the judgment debtor in that prior suit. Under a statutory procedure, Wilson had an execution issued against certain non-resident stockholders of the debtor railroad, and levied upon certain locally-available stock which they owned in the St. Louis-San Francisco Railway Company. The opin-

ion cited, 108 Mo. 588, is a suit wherein Wilson sought to compel the St. Louis-San Francisco Railway Company to transfer upon its books the stock upon which he had levied. Wilson contended that the non-resident stockholders were in effect parties to the original action, hence in effect judgment debtors. In passing upon that contention, the Supreme Court of Missouri said (l. c. 108 Mo. 601):

> "Accepting these authorities as the correct guide, any proceeding against the stockholders subsequent to the judgment against the corporation must be regarded as an **original and independent proceeding, as much so as is garnishment process against a mere stranger to the record.**" (Emphasis ours.)

Thus it is clear that the blind application of such terms as "dependent", "ancillary", "auxiliary" from Missouri cases only confuses the fundamental issue. In some contexts and in some frames of reference a garnishment in aid of execution may be "ancillary." For example, it is self-evident that a garnishment in aid of execution must come after and follow, legally and chronologically, some action in which a judgment has been obtained. If there were no judgment, there would be no garnishment in aid of execution. But as between the judgment creditor and the garnishee, the action is an original and independent proceeding. Especially as to the garnishee (the defendant party, the removing party, a stranger to the prior suit), the garnishment action original and independent—and we respectfully state that it is the right and interest of the defending and removing party which the Congress has sought to protect by adopting the removal statutes. Certainly as to that defending and removing party, the action is original, and not derivative.

Petitioner cites and quotes at length from Brucker v. Georgia Casualty Company, 14 F. (2) 688 (E. D. Mo.), in which case the District Court pondered the problem as to

how the garnishee could, in the District Court, avail itself of the option under Section 525.070, Revised Statutes of Missouri, 1949, of discharging all liability before judgment on the garnishment by making payment to the state sheriff of the amount admittedly due. This problem, if it ever really existed, was resolved by Rule 64, Federal Rules of Civil Procedure, adopted subsequent to the Brucker decision. That rule in effect adopts by reference the Missouri law pertaining to garnishment and attachment (as to Federal courts sitting in Missouri, of course). Since a United States Marshal has the same functions as the state sheriff with respect to service of process and levying of writs, the garnishee would avail itself of the privilege under Section 525.070 (Mo. Rev. Stats., 1949), by making such payment to the Marshal. But logically beyond that procedural section, it is utterly unrealistic to suppose that an insurance company garnishee, subjected to garnishment after declining for cause to pay a judgment, would thereafter unjustly suffer by not being able to pay to a sheriff the amount garnished. It is obvious that the garnishee has chosen to contest, and not to pay. And it is completely fallacious to contend, as does petitioner, that a garnishee must be denied a Constitutional **right** of removal, further defined by an act of Congress, in order that it might at some indefinite future time be in position to assert a **privilege** under state law. The assertion of a Constitutional right of removal must take precedence over the preservation of a privilege (not to contest a garnishment) bestowed by the state law.

But even assuming that the opinion of the District Court in the Brucker case, supra, calls attention to some complications which might follow removal of a garnishment in aid of execution, would the complications be any greater or more insoluble than an instance in which garnishment or attachment had been used in aid of service? Obviously not, and in this regard we respectfully call to the atten-

tion of the Court Rule 64, Federal Rules of Civil Procedure, supra, which specifically provides for the application of state codes regarding garnishment in actions removed from a state court to a District Court.

b. Garnishment, as presented in the instant case, is clearly an "action" within the meaning of Section 1441 (a), 28 U. S. C. A.; Bradford v. Southern Ry. Co., 195 U. S. 243, 248, 25 S. C. 55, 49 L. Ed. 178, 180; Bouvier's L. D.

Petitioner contends that the instant proceeding is not removable because it is not "a separate and independent claim or cause of action" within the meaning of section 1441(c)[2] 28 U. S. C. A. American Fire Ins. Co. v. Finn, 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702, is cited as authority for this position, but the opinion does not support petitioner's contention. In that case the plaintiff instituted action in the state court against two non-resident insurance companies and one resident individual. The first count stated a cause of action against one insurance company; the second count, against the other insurance company; and the third, against the individual defendant. However, all counts were based on a single transaction and a single set of facts. The gist of plaintiff's pleading was that liability lay among the three parties but it was uncertain which one was responsible. This Court held that the counts against the two insurance companies were not removable because they were not separate and independent claims or causes of action under section 1441 (c), 28 U. S. C. A. The same claim was being asserted in the same suit against a resident individual.

---

[2] Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction. June 25, 1948, c. 646, 62 Stat. 937.

The facts of that case and the point for decision therein clearly have no relation to the facts and issue of the instant case. The Finn case, supra, held only that section 1441 (c) created a new test for removal when one claim, theretofore considered removable, is joined with another non-removable claim. Section 1441 (c) clearly has no application to the issue in the case at bar, because in this case there is no joinder of claims against multiple defendants, some resident and some non-resident. Here one claim is asserted, against one non-resident defendant.

The instant case is not a situation where many issues are presented in a single lawsuit, some between residents of the same state, and others between residents of different states. No decision need be made here that one part or one issue in the case is or is not "separate and independent." There are but two opposite and adverse parties; the issues are entirely between them. Essentially this case is a suit on a contract by plaintiff against the alleged insurer; the issue is whether or not the contract has been abrogated.

A study of the legislative history of section 1441 (c) shows that this section of the removal statutes encompasses an entirely different situation than obtains in the instant matter. Section 1441 (c) was preceded by 28 U. S. C. A., section 71; the many cases decided thereunder, of which Geer v. Mathieson Alkali Works, 190 U. S. 428, 23 S. Ct. 807, 47 L. Ed. 1122, is typical, make apparent the legislative intent of section 1441 (c).

In section 1441 (c) the decisive terms are "claim or cause of action" and "joined." Obviously these terms refer to a joinder of claims against more than one defendant, in one action. There is no joinder of claims in the instant case; the claim against garnishee is the only claim being presented against anyone. There can be no claim asserted against the judgment debtor; whatever

right or claim plaintiff might have had against him has been reduced to judgment and merged in the judgment. We respectfully submit that section 1441 (c) has no applicability to the instant case in any way.

III.

Petitioner states (Petn., p. 6) that the decision of the Court of Appeals for the Eighth Circuit is in conflict with two decisions of this Court and one opinion of the Court of Appeals for the Seventh Circuit. Analysis of the cited cases fails to support petitioner's contentions.

a. American Fire Insurance Company v. Finn has already been discussed and distinguished, supra, and its total dissimilarity noted.

First National Bank v. Turnbull, 16 Wall. 190, 21 L. Ed. 296, was a contest between a judgment creditor and a third party over the right to certain property taken under execution. No process was issued against the third party, and there was no garnishment against him—in fact, the third party voluntarily subjected himself to the jurisdiction of the state court although he was a stranger to the record. He entered the proceeding to make claim to property already in the constructive custody of the state court. No pleadings were filed to formulate the issues. The right of the judgment creditor was based solely and completely on the existence of the state court judgment, and did not depend on the interpretation of some other instrument such as an insurance policy. The issue to be tried was simply whether the execution process of the state court had been misapplied in seizing property which did not belong to the judgment debtor. Removal was not sought until after the state court had determined that the issues between the judgment creditor and the intervening third party would be tried by the court in a sum-

mary proceeding according to state statute. This was no garnishment **against** a third party—this was a claim **by** a third party to property already in the custody of the state officers. Under such circumstances, it was held that there was no right of removal in the third party. That case is manifestly different than the case at bar. Here the garnishee is brought in by service of process involuntarily, pleadings define the issues between plaintiff and garnishee, there is no property in custody (see infra), the rights asserted by plaintiff below depend upon the terms and interpretation of an insurance policy not in evidence in the action in which judgment was obtained, and the proceeding is a formal jury trial rather than summary hearing. The facts adequately distinguish the two situations. The opinion in Bank v. Turnbull, supra, was noted and reviewed by this Court in Krippendorf v. Hyde, 110 U. S. 276, 282, 4 S. Ct. 27, 28 L. Ed. 145, 148, wherein it was specifically noted that the Bank v. Turnbull case concerned possible misapplication of state court process, and the equities involved in the ownership of property in the custody of state officers. Obviously, therefore, the opinion in Bank v. Turnbull, supra, is not valid authority for denying the right of removal in the instant case, under the entirely different state of facts here presented.

A brief review of the line of authority cited as precedents in Bank v. Turnbull is enlightening as to the issues there involved. Gwin v. Breedlove, 2 How. 29, 11 L. Ed. 167, involved a motion for judgment against a United States Marshal. A judgment creditor had obtained his judgment in the (then) United States Circuit Court. Levying under an execution issued by that Court, the Marshal had accepted bank notes instead of demanding gold or silver. The banks which had issued the notes failed, and the judgment creditor moved for judgment against the Marshal under a statutory proceeding. This Court held that diversity of citizenship was not required to be shown

on the record in order to confer or maintain jurisdiction, because the proceeding was only a means to compel a court officer to stand responsible for proper performance of his duty with respect to property in his custody. Neither the facts nor the principles stated in the opinion in any way involve garnishment or removal, or any questions analogous thereto.

Another precedent cited in Bank v. Turnbull is Freeman v. Howe, 24 How. 450, 16 L. Ed. 749, 752. The opinion was rendered on writ of error from this Court to the Supreme Judicial Court of Massachusetts. Freeman, a United States Marshal, had attached certain railway cars in aid of service in a cause instituted in federal court. Howe and others, claiming to be mortgagees of the railway cars, brought a replevin action in the state court, and obtained judgment against Freeman, the Marshal. On the writ of error to the state court, this Court held that as to property in custody of the federal officer, the federal court had exclusive jurisdiction to determine its disposition. The repleviners, Howe and others, were in effect invited to seek relief by a bill in equity in the federal court, to redress any injustice resulting from the attachment. The case in no way involved removal of causes, and again illustrates that Bank v. Turnbull, supra, was decided on the basis that as to property within the custody of a court, that court has exclusive jurisdiction, whether the state or federal court first acquire such custody. None of these cases stands for, or even involves, the proposition that a garnishment in aid of execution cannot be removed by the garnishee. The true principle involved in the foregoing decisions is ancient in our law, and is recognized in Touchey v. New York Life Insurance Company, 314 U. S. 118, 134-135, 62 S. Ct. 139, 86 L. Ed. 100, 105, wherein this Court said:

> " " " However, a line of cases beginning with Hagan v. Lucas, 10 Pet. (U. S.) 400, 9 L. Ed. 470, holds that the court, whether federal or state, which first

takes possession of a res withdraws the property from the reach of the other."

Bank v. Turnbull was subject to further comment by this Court in the same vein in Bondurant v. Watson, 103 U. S. 281, 26 L. Ed. 447, 450.

The rule expressed in these cases is based not only on a plain chronological priority, but also on the practical necessity of avoiding open conflict should the state sheriff try to dispossess the United States Marshal of property in his custody and vice versa: Touchey v. New York Life Insurance Company, supra. Such a situation is not created by the instant proceeding. Service on the garnishee is personal service and no property or "res" is in the possession of the state court! This is a principle firmly imbedded in Missouri law. In Calumet Paper Company v. Haskell Show Printing Company, 144 Mo. 331, 339, 340, 45 S. W. 1115, the Supreme Court of Missouri said:

"The question then is what lien or prior right, if any, plaintiff acquired by reason of the garnishment, the property not being attached, over all other creditors of the company? **It was ruled in McGarry v. Lewis Coal Co., supra, that no lien is created in favor of plaintiff on the property of the defendant in the hands of the garnishee by reason of the garnishment process. The court said: 'Ordinarily property is not deemed to be in the custody of the law until actually seized and reduced into possession by the officer.** Under the law applicable to attachments, it is the levy by the officer that creates the lien. If the plaintiff is not satisfied to look to the responsibility of the garnishee, he may apply to the court, or to the judge in vacation, and obtain an order upon the garnishee to deliver the property to the sheriff or into court, or the court may permit the garnishee to retain the property upon the execution of a bond to plaintiff with security" (Emphasis ours).

And in State ex rel. Rabiste v. Southern, Judge, 300 Mo. 417, 431, 254 S. W. 166, 169, 170, the Supreme Court of Missouri again stated:

> "No lien exists in favor of a plaintiff upon property of an attachment or execution defendant in the hands of the garnishee until such property comes into the hands of the sheriff. Until that time, such plaintiff must look to the personal responsibility of garnishee, unless he proceeds under Section 1853 to have such property delivered to the sheriff or to have security for its delivery exacted from garnishee as provided in said section (McGarry v. Lewis Coal Co., 93 Mo. 237; Calumet Paper Co. v. Haskell Show Printing Co., 141 Mo. 331, l. c. 341)."

This state of the law in Missouri was recognized by Mr. Justice Cardozo, of this honorable Court, in his dissenting opinion in Sanders v. Armour Fertilizer Works, 292 U. S. 190, 54 S. Ct. 677, 683, 684, 78 L. Ed. 1206, 1214 (cited by petitioner in another connection):

> "In the conflict of laws the difference may be important between realities and metaphors, between the organism and the germ. Sometimes the Illinois rule is accepted, **and there is said to be no lien**, or one that does no more than restrain the garnishee from making voluntary payments. See e. g. Commercial State Bank v. Pierce, 176 Iowa 722, 158 N. W. 481; **McGarry v. Lewis Coal Co., 93 Mo. 237, 6 S. W. 81, 3 Am. St. Rep. 522**; Parker v. Farr, 2 Browne (Pa.) 331" (Emphasis ours).

Hence, the holding in First National Bank v. Turnbull, supra, and the line of cases therein cited as authority and precedent, have no bearing on the instant case and are not authority for petitioner's contention here. The decision of the Court of Appeals for the Eighth Circuit herein is not in conflict with any opinion or decision of this Court.

b. Nor is the instant opinion in conflict with any decision of any other Court of Appeals. In American Automobile Insurance Company v. Freundt (Seventh Circuit), 103 Fed. (2) 613, cited by petitioner, the issue of the removability of garnishments was not before the Court. That case was a declaratory judgment action brought in the District Court to determine coverage under a policy of insurance. The Court of Appeals for the Seventh Circuit held that the District Court was within the bounds of its discretion in refusing to take jurisdiction to hear the matter. The issue for decision was the breadth of the discretion vested in the District Court to hear or refuse to hear declaratory judgment suits, and whether or not in the particular instance the District Court had abused its discretion by refusing declaratory relief. The issue of removability of a garnishment was in no way involved, and hence could not be decided in that case. There is language in the opinion (l. c. 617) to the effect that a garnishment would not be removable under Illinois law; however, the law of Illinois is not there reviewed with respect to the institution of and procedure in garnishment actions, and since the point was not before the Court for decision the language is patently *obiter dictum*.

This Court has not undertaken to review on writ of certiorari any and all apparent conflicts between the Courts of Appeals. In Rice v. Sioux City Cemetery, 349 U. S. 70, 79, 75 S. Ct. 614, 99 L. Ed. 897, 904, this Court quotes with approval from the opinion of Mr. Chief Justice Taft in Layne & Bowler Corporation v. Western Well Works, Inc., 261 U. S. 387, 393, 67 L. Ed. 712, 714, 43 S. Ct. 422, in which it is said:

"• • • It is very important that we be consistent in not granting the writ of certiorari except in cases involving principles, the settlement of which is of importance to the public as distinguished from that of

the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. The present case certainly comes under neither head."

The same comment applies to the case at bar. There is no real conflict between any Courts of Appeals. A "conflict" necessarily requires that cases be **decided differently** under the facts which are at least similar. Since the issue of removability of garnishment actions was not before the Seventh Circuit in the American Automobile case, supra, and hence could not have been **decided**, there can be no real, and certainly no embarrassing conflict. The Eighth Circuit Court of Appeals has in two opinions, including the instant suit, decided issues properly before it. The Seventh Circuit Court of Appeals is still free to decide the issue when and if it is properly presented and raised for decision. The Seventh Circuit is not bound by its obiter dictum; as was said in Harriman v. Northern Securities Company, 197 U. S. 244, 291, 25 S. Ct. 493, 49 L. Ed. 739, 761:

> "Counsel argue, however, that certain expressions in the opinion of Mr. Justice Harlan so enlarged the scope of the decree as to give it the effect now attributed to it by complainants.
>
> "This suggestion is inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits. Cohen v. Virginia, 6 Wheat. 399, 5 L. Ed. 290; Carroll v. Carroll, 16 How. 279, 14 L. Ed. 938."

To the same effect is the opinion in United States v. County Court of Clark County, 96 U. S. 211, 217, 218, 24 L. Ed. 628, 630. These opinions but express an axiom of the law: *obiter dicta* neither decide any issue, nor bind the court or any future litigant. Therefore, there is no "real" or "embarrassing" conflict between the *obiter* in the Ameri-

can Automobile case, supra, Seventh Circuit, and the instant opinion in the Eighth Circuit; and this Honorable Court should not issue its writ to review a **decision** in the light of an *obiter dictum*.

There are no other opinions even alleged to be in conflict with the opinion of the Eighth Circuit Court of Appeals in the instant case.

IV.

There are but two appellate court opinions in the entire federal judicial system directly concerned with and deciding the removability of garnishments in aid of execution. One is Stoll v. Hawkeye Casualty Company, 185 F. (2) 96; the other is the opinion in the case now at bar. The two opinions are consistent. Both are by the United States Court of Appeals for the Eighth Circuit. There are no other opinions in any case wherein the issue has been before either this Honorable Court or any other Court of Appeals for decision, with which the instant opinion below could conflict.

Within the meaning of the Constitution of the United States, Article III, establishing the jurisdiction of the federal courts, and the acts of Congress pursuant thereto, and within the meaning of the laws and applicable decisions of the Supreme Court of Missouri, the garnishment proceeding involved was an independent action between plaintiff (petitioner) and garnishee (respondent), and did not involve property in the custody of the state court so as to prevent the District Court from accepting jurisdiction.

The very dearth of opinions illustrates forcibly that the issue is not one of widespread general interest, or affecting the public in general so as to either require or justify the issuance of this Court's writ of certiorari. The issue is

one which arises most infrequently and on the rare occasions when it does, it is a matter of only private interest to the litigants involved.

For the reasons stated, we respectfully pray that the petition for a writ of certiorari be denied.

Respectfully submitted,

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